IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 24TH JULY 2007 / 2ND SRAVANA 1929

CRL.A.No. 874 of 2007()

SC.1148/2001 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA
CP.326/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II,NEYYATTINKARA

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APPELLANT:

RAJENDRAN @ RAJU
S/O. YOHANNAN, C.NO.1368
CENTRAL PRISON, TRIVNDRUM

BY ADV. LIJU M.P[STATE BRIEF]

RESPONDENT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SRI.C.M.KAMMAPPU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24.7.2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.874 OF 2007

Dated this the 24th day of July, 2007.

JUDGMENT

The accused was charge sheeted by the police for an offence punishable under Section 58 of the Abkari Act for possession of 4 liters of arrack on 28.3.2000 at about 8.50 a.m. To prove the case against the appellant, prosecution examined Pws 1 to 3 and relied on Exts.P1 to P9. MO1 is also produced. The appellant denied the prosecution case and had stated that he was arrested not as spoken to by the prosecution witnesses, but from a shop in the previous night of 28.3.2000. However, the trial court found the appellant guilty under Section 58 of the Abkari Act and he was convicted thereunder and sentenced to undergo R.I for two years and to pay a fine of Rs. One lakh with default sentence of payment of fine, to undergo R.I for a further period of three months. The judgment of the trial court is challenged in this appeal.

2. This appeal is filed through the jail authorities. Since the appellant is not having his own counsel to argue the matter, a member from the State brief panel has been appointed to argue the

matter. This Court heard the learned counsel appearing for the appellant and the learned Public Prosecutor. The learned counsel appearing for the appellant mainly had taken three contentions before this Court. Firstly it is submitted that the trial court had committed a serious error in placing reliance on the evidence of Pws 1 and 2, who were the police officials, to prove the case against the appellant as the prosecution has not examined any independent witnesses to prove the seizure of MO1 or even the action taken by PW2. Secondly, it is contended that while detecting the offence, PW2 - the Sub Inspector of Police had committed a serious error in not getting the presence of independent witnesses to watch the action taken by him and hence, PW2- Sub Inspector had violated the provisions of the Abkari Act as well as the provisions of the Kerala Excise Manuel. Thirdly, it is contended that the evidence of PWs 1 and 2 does not prove that the contraband was kept in safe custody till the sample was taken for analysis, hence there is substitution of the same.

3. The prosecution case as spoken to by Pws 1 and 2 is that while PW2 – the Sub Inspector of Police, Vellarada Police Station was on patrol duty along with the other police officials reached at the

place called Vattavila and got information that a person was engaged in selling arrack at Vattavila, Pulloorkulangara. On getting the above information, the police party reached the place called Vattavila at Chenkal Village and found that the appellant was in possession of a jerry can having the capacity of 5 liters and on seeing the police party, the appellant tried to escape from the spot. However, he was stopped and questioned. On questioning him it was revealed that the can contained arrack and it was kept for sale. On preparing Ext.P1 mahazar, MO1 can was seized in the presence of independent witnesses and on issuing an arrest memo, the appellant was arrested. Both the appellant and the contraband were produced before the court on the same day. After filing requisite requisition before the court for analysing the sample taken from MO1 can and as per Ext.P5 it was reported that the sample contained 26.62% ethyl alcohol by volume and hence, the final charge has been filed before the court. The trial court found that the evidence of Pw1- the Head Constable, who accompanied PW2- the Sub Inspector, was acceptable and non-examination of the independent witnesses, whose name appeared in Ext.P2 mahazar, was not a reason to believe Pws 1 and 2. The criticism levelled against the evidence of these witnesses was that even though Ext.P1 mahazar contained

the names of two independent witnesses, none of that independent witnesses was examined by the prosecution to prove the action taken by PW2 at the spot and at the time of arrest of the appellant. In this context the trial court had found that even though two names were found in Ext.P1 mahazar as independent witnesses, the Prosecution had given up these witnesses. The trial court found that if the evidence of these witnesses is acceptable and that does not contain any infirmity, there is no bar for proving the prosecution case against the appellant. The contention raised by the counsel is that as Ext.P1 contained the names of two independent witnesses and the prosecution was also aware that if these witnesses were examined before the court, they would not support the prosecution case at all. But that by itself may not be a reason for not examining any independent witnesses. However, the case suggested to Pws 1 and 2 and the case set up by the appellant when he was questioned under Section 313 would not suggest that the appellant was implicated falsely by the police and the police officials have foisted the case against the appellant with an ulterior motive or with any prior enmity. In the above circumstances, the trial court is fully justified in placing reliance on the evidence of Pws 1 and 2. Apart from the evidence of PW2, PW3- the Thondi Clerk attached to the

committal court was examined before the court. PW3 had given evidence before the court that the thondi article namely MO1 was reached at the court on 29.3.2000 itself, i.e, on the next day of detection of the crime. However, in Ext.P4 thondi list it was seen that magistrate had recorded that MO1 may be verified and received on 28.3.2000 as per the initial of the magistrate. Apart from the above, it was the case of PW2 – the Sub Inspector that MO1 and the appellant were produced before the court on the same day. In the above circumstances, the evidence given by PW3 that MO1 was seen or received in the court on 29.3.2000 may not have much consequences.. However this witness has stated before the court that as per the direction given by the magistrate, the sample has been collected and sent for chemical analysis by himself. Though this witness was cross examined at length, his evidence has not been shattered to prove that the sample has been taken from MO1 and got analysed as per the direction given by the court. In the above circumstances, Ext. P5 report clearly proves that the sample taken from MO1 can was produced before the court on the same day. Hence, non-examination of the independent witnesses, whose names appeared in Ext.P1- mahazar may not fatal to the prosecution case.- Even though it was suggested to Pws 1 and 2 that the seal and the

label fixed by PW2 on MO1 have not seen when it was examined in the court during trial, that by itself was not a reason to reject the evidence of Pw 2, who had given evidence before the court that MO1 was seized from the appellant and it was duly labeled and sealed. Unless and until it is proved or suggested that the contraband article has been substituted by the prosecution, it is not possible to hold that the evidence of Pws 1 and 2 cannot be the basis for finding that the appellant was found in possession of MO1 and MO1 was seized as spoken to by Pws 1 and 2. In the above circumstances, the finding of the trial court is on evidence.

4. However, the trial court on the basis of the evidence adduced by the prosecution witnesses found that the appellant had committed an offence punishable under Section 58 of the Abkari Act. The prosecution case is that the appellant was found in possession of 4 liters of arrack on 28.3.2000 at about 8.50 a.m without having any permit or license under the provisions of the Abakri Act. If a person is found in possession of arrack without having any license or permit, which would constitute an offence under Section 8(1) read with Section 8(2) of the Abkari Act.

5. In the above circumstances, the finding of the trial court that the appellant committed an offence punishable under Section 58 is set aside instead he is found guilty for an offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act. The trial court had imposed R.I for two years and fine of Rs. One lakh against the appellant. After considering the fact that the case was of the year 2000 and the prosecution has not adduced any evidence to show that the appellant was engaged in selling arrack, the sentence imposed against the appellant has to be reduced.

6. Accordingly, appellant is convicted under Section 8(1) read with 8(2) of the Abkari Act. He is sentenced to undergo R.I for one year and to pay a fine of Rs.One lakh with default sentence of payment of fine, to undergo S.I for a period of three months. The appellant is entitled for the benefit of set off under Section 428 of Cr.P.C.

With the above modifications in the conviction and sentence, in all other respects the appeal stands dismissed.

K. THANKAPPAN, JUDGE.

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K THANKAPPAN, J.

CRL.A.NO.874 OF 2007

JUDGMENT

24th July, 2007.